No.

In The

Supreme Court of the United States

October Term, 1950

THE GOVERNMENT OF THE DOMINION OF CANADA,
Petitioner,

v.

HAL ROACH, JR., INDIVIDUALLY AND TRADING AS
RADIO NEWS SERVICE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1960

No. .....

THE GOVERNMENT OF THE DOMINICAN REPUBLIC,
Petitioner,

v.

HAL ROACH, JR., INDIVIDUALLY AND TRADING AS RADIO NEWS SERVICE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, The Government of the Dominican Republic, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on June 9, 1960.

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported, and is attached to this petition as Appendix A.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 9, 1960, R. 20. Rehearing was denied on July 19, 1960, R. 23. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTION PRESENTED

Is a non-resident, not in custody, coming within the jurisdiction of the District of Columbia only for arraignment as a criminal defendant, automatically immune from service of process in a civil action instituted in the United States District Court for the District of Columbia.

STATEMENT

On September 4, 1959, Petitioner filed a complaint in the United States District Court for the District of Columbia (J.A. 3), against Alexander Guterma, Hal Roach, Jr., Hal Roach Studios, Inc., Mutual Broadcasting System, Inc., and Alexander Guterma and Hal Roach, Jr., trading as Radio News Service Corporation, for recission of a contract on grounds of specified fraud, non-performance and other grounds, demanding return of the sum of Seven Hundred Fifty Thousand Dollars.[1]

Respondent is a resident of the State of California (J.A. 11). On the same date that the complaint was filed, Respondent, not in custody, came to the District of Columbia to plea to an indictment returned by a Grand Jury in the District of Columbia which charged Respondent with violations of the Act of June 25, 1948, C. 645, 62 Stat. 701, U.S.C., Title 18, Section 371 (wherein overt acts within the District of Columbia were alleged) and the Act of June 8, 1938, as amended, 52 Stat. 631, U.S.C., Title 22, Section 612, 618, (Criminal No. 792-59, in the United States District Court for the District of Columbia). Prior to his appearance in Court on said date to plead to the indictment, Respondent was served by a

[1] As to the Defendant, Alexander Guterma, the case is at issue; as to the Defendant, Mutual Broadcasting System, Inc. the case was subsequently settled and dismissed; as to the Defendant, Hal Roach Studios, Inc., Petitioner has admitted the invalidity of the service.

United States Marshal with a copy of the summons and complaint in this cause, in the United States Courthouse (J.A. 11).

On September 24, 1959, Respondent, filed a motion to quash service of the summons and complaint and or to dismiss (J.A. 10). Petitioner filed objections thereto (J.A. 12-14), and the motion came on to be heard before the Honorable Richmond B. Keech, United States District Judge, who following argument granted said motion and quashed service of the summons and complaint (J.A. 15).[2]

Petitioner has refrained from interfering with the disposition of said criminal cause by withholding use of the discovery process until completion of the trial of the criminal cause. Substantially the same factual matters are involved in both the criminal cause and this civil action.

REASONS FOR GRANTING WRIT

Non-resident party litigants and witnesses in civil causes are immune from service of process in other civil actions while within the jurisdiction in connection with the litigation. The same is true of non-resident witnesses in a criminal cause. Whether non-resident criminal defendants, not in custody, should also enjoy this immunity is the question presented in this cause.

In 1921, in *Church* v. *Church*, D.C. Cir., 270 F. 361, 50 App. D.C. 239, the Court granted such immunity to a non-resident criminal defendant. Since that time the specific issue has not been decided by other federal appellate courts, and only a few cases on the point have been decided in the lower federal courts.

Thirteen years after the decision in the *Church* case, supra, this Court in *Lamb* v. *Schmidt, Receiver*, 285 U.S.

[2] Respondent withdrew his Motion to Dismiss.

222, 52 S. Ct. 317, 76 L. Ed. 720 emphasized that the privilege of immunity had limitations; that the privilege belonged to the Court and not the Defendant; and the application of the privilege was not axiomatic but should be extended or withheld as judicial necessities require. It is noteworthy that in briefly touching upon the issue in the instant case, the Court in the *Lamb* case, supra, did not cite the decision of *Church* v. *Church*, supra, but did cite, *Netograph Co.* v. *Scrugham*, 197 N.Y. 377, 90 N.E. 962, an adverse ruling.

The failure to cite the *Church* case, supra, was pointed out in *United States* v. *Conley* (USDC D. Mass.) 80 F. Supp. 700 (1948) as an indication that the Supreme Court might take a different view of the problem. In *Employers Mutual Liability Insurance Co. of Wisconsin* v. *Hitchcock*, (USDC ED Mo. N.D.) 158 F. Supp. 783, the Court flatly rejected the ruling of the *Church* case, supra, and held that a non-resident criminal defendant was not immune from service of process in a civil action, absent proven fraud. This is the rule which is also held in many states: *Crusco* v. *Strunk Steel Company et al.*, 365 Penn 326, 74 A.2d 142 (1950); *State* v. *Taran*, 253 Minn. 158, 91 N.W. 2d 444; *Glaze* v. *Glaze* (Mo. Apps) 311 S.W. 2d 575; *Moore* v. *Green*, 73 N.C. 394 (1875); *Ex Parte Henderson*, 27 N.D. 155, 145 N.W. 574 (1914); *Anderson* v. *Atkins*, 161 Tenn 137, 29 S.W. 2d 248 (1930); *State ex rel. Alexander-Coplin & Co. et al.* v. *Superior Court for King County*, 186 Wash. 354, 57 P. 2d 1262 (1936).

The position of the Court of Appeals, in the instant case, was that, if the rule were otherwise, it would discourage his appearance for arraignment in the criminal cause, through his fear of being served with process in the civil action. Such an automatic application of the rule ignores the rights of creditors; and ignores those objections which Petitioner set forth in its objections to the Motion to Quash service of the summons and com-

plaint, to wit, that such an application will result in the same civil action being tried in two federal courts, involving the same evidence, and the same witnesses.

Actually, the non-resident criminal defendant has two choices, if the United States Government so elects. He may appear voluntarily on the date set for arraignment or he may be arrested and brought to his arraignment in custody. Do the expenses involved in utilizing the second choice, and delaying the arraignment briefly, outweight the interest of creditors, and the large expenses in conducting two trials of the same issues in two courts?

If a non-resident criminal defendant were not entitled to immunity from service of process in a civil action, the Court could fully protect his rights by ordering that the filing of motions, an answer to the complaint, and any discovery process be stayed, pending completion of the criminal cause.

It is respectfully submitted that the issue in the instant case is basic and important. There is, as to this issue, conflict between the United States Court of Appeals for the District of Columbia Circuit and certain United States District Courts, in other circuits.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD L. CAREY,
WALTER E. GILLCRIST
Counsel for Petitioner

August 16, 1960

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,510

THE GOVERNMENT OF THE DOMINICAN REPUBLIC, APPELLANT

v.

HAL ROACH, JR., INDIVIDUALLY AND TRADING AS RADIO NEWS SERVICE CORPORATION, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided June 9, 1960

Mr. Edward L. Carey, with whom *Mr. Walter E. Gillcrist* was on the brief, for appellant.

Mr. William H. Collins for appellee.

Before PHILLIPS, *Senior United States Circuit Judge for the Tenth Circuit*,* and BAZELON and WASHINGTON, *Circuit Judges*.

PHILLIPS, *Circuit Judge*: This is an appeal from an order quashing the service upon Roach of a summons and complaint in a civil action, brought against him by the Dominican Republic in the United States District Court for the District of Columbia.

Roach is a resident of the State of California. He was charged by an indictment returned against him in the

* Sitting by designation pursuant to 28 U. S. Code § 294(d).

United States District Court for the District of Columbia with violations of 18 U.S.C. § 371 (1958), and 22 U.S.C. §§ 612, 618 (1958).

Roach came from California to Washington by plane, arriving in Washington the morning of September 4, 1959. He came to Washington for the sole purpose of voluntarily appearing for arraignment on the indictment. Absent that reason he would not have come to Washington on such date. As he was about to enter the courtroom where the arraignment was to take place, the process referred to above was served upon him.

The civil action was filed the same day the process was served. It was brought to obtain rescission of a contract on the ground of fraud. There is no relation between it and the criminal action, except that to some extent the same evidence may be introduced in the civil and criminal action.

Counsel for the Dominican Republic concede that the decision of this court in *Church* v. *Church*, 50 U.S. App. D.C. 239, 270 Fed. 361 (1921)[1] sustains the order below, but urge that the holding in the *Church* case should be either limited or overruled. They predicate that contention on the decision of the Supreme Court of the United States in *Lamb* v. *Schmitt*, 285 U.S. 222 (1932).

In *Lamb* v. *Schmitt*, *supra*, the Court recognized the general rule "that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another" and stated that the rule "is founded, not upon the convenience of the individuals, but of the court itself" and that the rule "proceeds upon the ground that the due administration of justice requires that a court shall not permit

[1] See also: Schwarz v. Thomas, 95 U.S. App. D.C. 365, 366, 367, 222 F.2d 305, 306, 307 (1955); In re Hall, 296 Fed. 780, 782 (D.C. N.Y. 1924).

interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation."

It may be that the broad rule announced in *Church* v. *Church* is subject to limitation. We apply the *Church* rule here only to the limited extent required by the facts before us—to wit, voluntary appearance to criminal charges. We do not reach, and express no opinion concerning, questions whether the rule should be applied in other situations—for example, where attendance was not voluntary or where attendance at the trial of the cause by the person served with process in another action will not facilitate the disposition of such cause, or where the granting of immunity will defeat the ends of justice in the very cause for the protection of which the immunity is invoked.

In the *Lamb* case, process was served on Lamb in a proceeding ancillary to a principal suit in which Lamb had appeared as attorney for the defendant and was to recover funds involved in the principal suit and paid pendente lite as attorney's fees to Lamb.

The court held that the immunity should be withheld under the facts in that case, because the second suit was a mere continuance of the principal suit and was a part of it; the petitioner was already in attendance upon the litigation and his continued presence was necessary to aid and facilitate the pending litigation and to carry it to its final conclusion; and the denial of immunity would aid, rather than interfere with, the due administration of justice.

Here, denial of immunity would in nowise aid or facilitate the disposition of the criminal action, which has no

direct relation to the civil action. On the contrary, if a party situated as Roach was is subject to service of process while in attendance upon the trial of a criminal action, or while en route to and from the criminal court, the result would be to prevent, or through fear of service of process discourage, voluntary appearance and attendance of one whose presence is necessary to judicial administration in the criminal action. Hence, the instant case falls within the general rule well recognized in the Federal courts and not within any exception thereto.

Accordingly, we hold that the immunity was properly granted and the order is

Affirmed.

APPENDIX B

Filed June 9, 1960. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

Civil 2462-59

United States Court of Appeals For The District of Columbia Circuit

No. 15,510

THE GOVERNMENT OF THE DOMINICAN REPUBLIC, APPELLANT

v.

HAL ROACH, JR., Individually and Trading as Radio News Service Corporation, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before PHILLIPS, Senior United States Circuit Judge for the Tenth Circuit, and BAZELON and WASHINGTON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is Ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant his taxable costs on this appeal, and have execution therefor.

Per Curiam

Dated June 9, 1960.